

Motion for Rehearing Overruled; Reversed and Rendered; Opinion of March 15, 2001, Withdrawn and Substitute Majority Opinion and Concurring Opinion Filed September 20, 2001



In The
Fourteenth Court of Appeals

NO. 14-99-00077-CV

AMERICAN INDUSTRIES LIFE INSURANCE CO., Appellant

V.

**JOSE RUVALCABA AND MARIBEL RUVALCABA, INDIVIDUALLY AND AS
NEXT FRIENDS OF JOHNATHAN RUVALCABA, A MINOR, Appellees**

**On Appeal from the 151st District Court
Harris County, Texas
Trial Court Cause No. 97-08897**

**MAJORITY OPINION
ON MOTION FOR REHEARING**

We overrule appellees' motion for rehearing. We withdraw the opinion issued in this case on March 15, 2001, and we issue the following opinion in its place.

In this premises liability case, appellant American Industries Life Insurance Company ("American Industries") appeals from the trial court's judgment in favor of appellees and plaintiffs below, Jose Ruvalcaba and Maribel Ruvalcaba, individually and as next friends of Johnathan Ruvalcaba, a minor ("Ruvalcabas"). For the reasons stated below, we reverse

the trial court's judgment and render judgment that the Ruvalcabas take nothing.

Background and Procedural History

Jose Ruvalcaba worked at a private security company on the second floor of a two-story office building owned and managed by American Industries ("Building"). On March 7, 1996, Jose's wife, Maribel Ruvalcaba, and his two-year old son, Johnathan, paid a noon-hour visit to Jose's workplace for the purpose of taking him to lunch. This was the first time that Maribel or Johnathan had ever been up to the offices of Jose's employer. When they arrived, Jose was busy "discussing a few accounts" with his boss, and so Maribel decided to take Johnathan and wait in the car. On their way out, Maribel and Johnathan started to descend a staircase that had an "open" handrail that did not comport with the current City of Houston Building Code. Maribel testified that, while they were descending the staircase, Johnathan fell through the open bannister, landed on his head on the ground, and lost consciousness for about five minutes.

Johnathan's parents took him to the emergency room at Ben Taub Hospital. Johnathan's treating physician found no contusions, lacerations, or broken bones. Johnathan had an abrasion on his scalp. Johnathan's CT scan showed no abnormalities. Johnathan was kept overnight for observation and released the next day. At a follow-up visit one week after the incident, Jose reported that Johnathan's behavior had changed markedly since his fall.

A pediatric neurologist later examined Johnathan and concluded that he had suffered a traumatic brain injury from the fall, resulting in permanent damage. A pediatric psychologist specializing in life-care planning estimated that, given the child's injuries and the behavioral problems caused by the fall, it would cost \$1,800,000 to care for Johnathan over the course of his lifetime.

Jose and Maribel filed a personal injury suit, individually, and as next friends of their son, Johnathan, against American Industries. The Ruvalcabas alleged that Johnathan was an invitee at the time of the occurrence made the basis of this suit. The Ruvalcabas alleged

that the open staircase in the Building constituted an “unreasonably unsafe condition” that American Industries had failed to make safe or warn them about. The Ruvalcabas claimed that American Industries was guilty of negligence, negligence *per se*, and gross negligence. The Ruvalcabas sought damages for Johnathan’s past and future physical pain and suffering, mental and emotional anguish, medical expenses, loss of earnings, physical impairment, and loss of mental faculties proximately caused by American Industries’ alleged negligence.

The parties agreed to a bench trial. The trial court granted American Industries’ motion for directed verdict on the Ruvalcabas’ allegation of gross negligence. The trial court found in favor of the Ruvalcabas on their negligence¹ claim and signed a final judgment awarding Jose and Maribel as next friends of Johnathan \$2,156,054.79² for future medical care,³ \$2,156,054.79 for past and future physical pain and mental anguish, \$2,156,054.79 for past and future physical impairment, and \$658,794.52 for future lost

¹ During trial, American Industries moved for a directed verdict as to the Ruvalcabas' negligence *per se* claim based on the violation of the Houston Building Code. American Industries pointed out that Section 102 of this code states that “the purpose of this Code is not to create or otherwise establish or designate any particular class or group of persons who will or should be especially protected or benefit by the terms of this code.” American Industries asserted that negligence *per se* cannot apply as a matter of law because the unambiguous language of this building code shows that it was not designed to protect a particular class of persons from a particular type of harm. *See Mundy v. Pirie-Slaughter Motor Co.*, 206 S.W.2d 587, 590 (Tex. 1947). The trial court took this motion under advisement. A docket entry signed by the trial court shows that the court granted this motion for directed verdict as to negligence *per se* when it ruled in the Ruvalcabas’ favor as to common-law negligence and damages. The trial court’s findings of fact and conclusions of law did not mention the negligence *per se* theory, and, in their Appellees’ Brief, the Ruvalcabas did not mention negligence *per se* as a reason for affirming the trial court’s judgment. Although docket entries are not generally considered to be binding orders of the court, they are effective in certain circumstances and can be used to show the appellate court what occurred in the lower court. *Quaestor Investments, Inc. v. State of Chiapas*, 997 S.W.2d 226, 229 (Tex. 1999); *N-S-W Corp. v. Snell*, 561 S.W.2d 798, 799 (Tex. 1977) (orig. proceeding); *Knox v. Long*, 257 S.W.2d 289, 292-93 (Tex. 1953), *overruled in part on other grounds*, *Jackson v. Hernandez*, 285 S.W.2d 184-91 (Tex. 1955). Under these circumstances, there is no presumed finding of negligence *per se* under TEX. R. CIV. P. 299 because the record shows that the trial court’s omission of negligence *per se* from its findings of fact was deliberate rather than inadvertent. *Burford v. Pounders*, 199 S.W.2d 141, 145 (Tex. 1947); *Vickery v. Comm’n for Lawyer Discipline*, 5 S.W.3d 241, 252 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

² All of the damage awards referenced in this paragraph include the amount of pre-judgment interest that was separately calculated and awarded in the judgment for each element of damages.

³ The Ruvalcabas did not seek damages for past medical expenses, and they do not appear to have incurred any medical expenses.

earning capacity. The trial court awarded Jose and Maribel \$598,904.11 each for loss of filial consortium and an additional \$59,890.41 to Maribel on her bystander claim. The total amount of the trial court's judgment was \$8,384,657.52 plus post-judgment interest and costs of court.

The trial court issued findings of fact and conclusions of law. The trial court found, among other things, as follows: (1) that American Industries is liable to the Ruvalcabas as owner of the premises where the injury occurred; (2) that American Industries' negligence proximately caused Johnathan's injuries; (3) that American Industries' negligence liability results from a condition of which it was actually aware or had constructive notice before Johnathan was injured; (4) that American Industries' liability is based on a negligent activity or instrumentality on its premises; (5) in the alternative, that American Industries is liable because the Ruvalcabas were business invitees on the premises of American Industries and because American Industries breached its negligence duty to these business invitees; (6) that Maribel is entitled to recover under a bystander theory; and (7) that Maribel and Jose are both entitled to recover for loss of filial consortium based on Johnathan's injuries.

The trial court denied American Industries' Motion for Judgment as a Matter of Law, or in the alternative, Motion to Modify, Correct or Reform the Final Judgment. On appeal, American Industries argues, among other things, that there is no evidence of the following: (1) that Johnathan was an invitee; (2) that American Industries breached its duty to Johnathan; and (3) that Johnathan suffered any of the damages awarded by the trial court. American Industries also argues that Maribel and Jose may not recover under their filial consortium and bystander claims because Johnathan is not entitled to any recovery.

Standard of Review

In the issues that we rule on in this opinion, American Industries contends that there

is no evidence to support the trial court's judgment in this case.⁴ The trial court's findings of fact have the same force and dignity as a jury verdict, and this court reviews sufficiency challenges to findings of fact by the same standards that are applied in reviewing a jury's findings. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991). When reviewing a no-evidence challenge, this court may consider only the evidence and reasonable inferences therefrom that support the challenged findings, and this court disregards all evidence and inferences to the contrary. *Texarkana Memorial Hosp., Inc. v. Murdock*, 946 S.W.2d 836, 838 (Tex. 1997). This court may sustain a no-evidence challenge if the record reveals one of the following:

- (1) the complete absence of a vital fact;
- (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact;
- (3) the evidence offered to prove a vital fact is no more than a scintilla; or
- (4) the evidence established conclusively the opposite of the vital fact.

Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 334 (Tex. 1998). More than a scintilla of evidence exists where the evidence supporting the finding, as a whole, rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). When this court sustains a no-evidence point, it must render judgment for the appellant. *Vista Chevrolet, Inc. v. Lewis*, 709 S.W.2d 176 (Tex. 1986).

⁴ At one point in its brief, American Industries argues that the trial court's finding that Johnathan was a business invitee is reviewed *de novo*. This is incorrect. While we review the trial court's determination of the existence and scope of a negligence duty *de novo*, we review determinations as to the factual predicate for an entrant's status as an invitee, licensee, or trespasser under the legal and/or factual sufficiency standards of review. American Industries seems to acknowledge this because it casts most of its argument in terms of the legal and/or factual sufficiency standards of review.

Is There Any Evidence of a Negligent Activity?

The duty of an owner or occupier of land to keep the premises in a safe condition may subject the owner or occupier to liability in two situations: (1) those arising from a defect in the premises, and (2) those arising from an activity or instrumentality. *Redinger v. Living, Inc.*, 689 S.W.2d 415, 417 (Tex. 1985). To recover on a premises-defect theory, a person must have been injured by a condition on the property, rather than an activity or instrumentality. See *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex.1992). To recover for injuries sustained as a result of a negligent activity or instrumentality, the plaintiff must have been injured by or as a contemporaneous result of the defendant's activity or instrumentality rather than by a condition created thereby. *Keetch*, 845 S.W.2d at 264.

The trial court found that American Industries was liable, in part, under a negligent activity or instrumentality theory. On appeal, the Ruvalcabas do not defend this finding or cite any evidence in the record to support it. We have reviewed the entire record on appeal and applied the appropriate standard of review; however, we find no evidence to support the trial court's finding that Johnathan's injuries were caused by a contemporaneous activity or instrumentality of American Industries as opposed to a condition created thereby. *Keetch*, 845 S.W.2d at 264; *Wochner v. Johnson*, 875 S.W.2d 470, 473-74 (Tex. App.—Waco 1994, no writ) (no recovery under negligent activity theory because, as a matter of law, case involved condition of stairs rather than contemporaneous activity). There is no evidence in the record to support a recovery by the Ruvalcabas against American Industries under a negligent activity or instrumentality theory.

Is There Any Evidence That Johnathan Was a Business Invitee?

In this case, the trial court also found that Johnathan and his mother were “business invitees” and that American Industries, as owner of the premises, breached its duty to Johnathan as a business invitee. In its first two issues, American Industries claims that the trial court erred because there is no evidence to support its finding that Johnathan was a business invitee.

Whether a duty exists is a threshold question of law for the court to decide from the facts surrounding the occurrence in question. *Thapar v. Zezulka*, 994 S.W.2d 635, 637 (Tex. 1999). The duty owed by American Industries to Johnathan differs depending on whether, at the time of the accident, Johnathan was an invitee, a licensee, or a trespasser. See *Rosas v. Buddie's Food Store*, 518 S.W.2d 534, 536 (Tex.1975). An invitee is “one who enters on another’s land with the owner’s knowledge and for the mutual benefit of both.”⁵ *Rosas*, 518 S.W.2d at 536. A licensee enters and remains on the land with the owner’s consent and for his own convenience or on business with someone other than the owner. See *Cowart v. Meeks*, 111 S.W.2d 1105, 1107 (Tex. 1938). A trespasser enters another's property without any lawful authority, permission, or invitation. *Texas-Louisiana Power Co. v. Webster*, 91 S.W.2d 302, 306 (Tex. 1936).

An owner or occupier of land has a duty to use reasonable care to protect an invitee from conditions that create an unreasonable risk of harm of which the owner or occupier knows or by the exercise of reasonable care would discover. *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 101 (Tex. 2000). However, the duty owed to a licensee is not to injure the licensee willfully, wantonly, or through gross negligence, and, in cases in which the owner or occupier has actual knowledge of a dangerous condition unknown to the licensee, to warn of or make safe the dangerous condition. *Lower Neches Valley Auth. v. Murphy*, 536 S.W.2d 561, 563 (Tex.1976). The only duty a premises owner or occupier owes to a trespasser is not to cause injury willfully, wantonly, or through gross negligence. *Texas Utilities Elec. Co. v. Timmons*, 947 S.W.2d 191, 193 (Tex. 1997).

If Johnathan was an invitee on the day he visited Jose at work, then the Ruvalcabas had to show that American Industries knew or, by the exercise of reasonable care, should have known the staircase was an unreasonable risk of harm. *CMH Homes, Inc.*, 15 S.W.3d

⁵ The Texas Supreme Court has not adopted the "public invitee" concept of RESTATEMENT (SECOND) OF TORTS § 332 (1) & (2)(1965). See *Rosas*, 518 S.W.2d at 536. The Texas Supreme Court has adopted a similar concept, however, by extending invitee status to members of the public who are invited into a store that sells goods and that is open to the public for the purpose of allowing them to inspect and/or buy the goods. See analysis of the Ruvalcabas' "public building" argument below.

at 101. The trial court granted American Industries' motion for directed verdict because there was no evidence that American Industries acted intentionally or with gross negligence. Therefore, if Johnathan was a licensee, then the Ruvalcabas had to establish that American Industries had actual knowledge of a dangerous condition in order to recover. *State Dept. of Highways v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992). If Johnathan was a trespasser, then the Ruvalcabas cannot recover because the trial court granted American Industries' motion for directed verdict and because the Ruvalcabas have not challenged that ruling on appeal. *See Texas Utilities Elec. Co.*, 947 S.W.2d at 193.

The general test for determining whether Maribel and Johnathan were invitees of American Industries is whether, at the time Johnathan was injured, they had present business relations with American Industries which would make their presence of mutual benefit to both them and to American Industries. *Olivier v. Snowden*, 426 S.W.2d 545, 550 (Tex. 1968); *Cowart*, 111 S.W.2d at 1107. A person is an invitee only where the owner or occupier invites the person to enter the premises and where the person's visit involves at least a potential pecuniary profit to the owner or occupier. *Olivier*, 426 S.W.2d at 550.

American Industries maintains that there is legally insufficient evidence that Johnathan and Maribel were invitees because there is no evidence that they were invited by American Industries to enter the premises or that there was any mutual benefit stemming from their visit. The Ruvalcabas do not cite any evidence in the record that American Industries invited Johnathan and Maribel to enter the premises or that there was a mutual benefit stemming from their visit. After considering all the evidence and reasonable inferences to support the challenged findings, and disregarding all inferences to the contrary, we hold that there is no evidence of any of the following at the time of the occurrence made the basis of this suit: (1) that Johnathan or his mother entered the Building at the invitation of American Industries; (2) that the presence of Johnathan and his mother in the Building was of mutual benefit to both the Ruvalcabas and to American Industries; or (3) that there was a potential pecuniary profit to American Industries associated with the visit of Johnathan and his mother to the Building. The evidence is thus legally insufficient to show

that Johnathan and his mother are invitees. *See Knorpp v. Hale*, 981 S.W.2d 469, 472-73 (Tex. App.—Texarkana 1998, no pet.); *Prestwood v Taylor*, 728 S.W.2d 455, 461-64 (Tex. App.—Austin 1987, writ ref'd n.r.e.); *Rowland v. City of Corpus Christi*, 620 S.W.2d 930, 933 (Tex. App.—Corpus Christi 1981, writ ref'd n.r.e.); *Mendez v. Knights of Columbus Hall*, 431 S.W.2d 29, 32 (Tex. Civ. App.—San Antonio 1968, no writ).

The Ruvalcabas do not seriously argue that Johnathan was an invitee under the traditional invitee analysis. The Ruvalcabas argue, however, that Johnathan is entitled to the equivalent of invitee status for the following reasons: (1) Johnathan should be treated as an invitee under RESTATEMENT (SECOND) OF TORTS § 360 (1965) and *Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (Tex. 1978) because he was the guest of a tenant; (2) Johnathan should be treated as an invitee because he was the child of a tenant; (3) Johnathan should be treated as an invitee because he was a visitor to a public building; and (4) Johnathan should be treated as an invitee because all young children are invitees in cases where the owner can reasonably expect young children to come onto the land.

Is Johnathan an Invitee under RESTATEMENT (SECOND) OF TORTS § 360?

On appeal, the Ruvalcabas rely heavily on § 360. This section gives entrants onto property the equivalent of invitee status for premises-liability purposes under certain circumstances, even though these entrants would not be considered invitees under the traditional analysis in premises-liability cases. *See* § 360. The Ruvalcabas argue that the Texas Supreme Court adopted § 360 in *Parker* and that, under *Parker* and its progeny, Johnathan is an invitee. *See Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (Tex. 1978). All of the cases cited by the Ruvalcabas in support of their § 360 argument are cases involving either apartment buildings or stores that are open to the public. *See Parker*, 565 S.W.2d at 514-515 (involving the guest of a tenant who fell down the apartment's unlit stairs); *Dickinson Arms-REO, L.P. v. Campbell*, 4 S.W.3d 333, 336 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (involving a tenant's boyfriend who was killed in the parking lot of her apartment); *Taylor v. Gilbert Gertner Enters.*, 466 S.W.2d 337, 341 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.) (involving an apartment complex laundry

room); *McCrorry Corp. v. Nacol*, 428 S.W.2d 414, 416 (Tex. App.—Beaumont 1968, writ ref'd n.r.e.) (involving injuries to a customer at a store open to the public). There is no evidence that the Building is an apartment complex or that the Building is a store where goods are offered for sale to the public. There is also no evidence that the general public is invited into the Building. The Ruvalcabas have not cited, and we have not found, any cases that extend *Parker* to an office building where there is no evidence that the building is held open to the general public (“Private Office Building”). We find no basis for extending *Parker* to a Private Office Building like the Building. On this ground alone, the Ruvalcabas' § 360 argument fails.

In the alternative, even if *Parker* and § 360 did apply to the Building, we hold that there is no evidence of the factual prerequisites for the application of § 360. This section gives entrants onto property the equivalent of invitee status if the plaintiff proves that the following factual prerequisites exist: (1) a possessor of land has leased a part of the premises; (2) the lessor has retained control over a part of the unleased premises that the lessee is entitled to use as appurtenant to the leasehold; (3) the entrants are injured by a dangerous condition on the part of the premises over which the lessor has retained control; (4) the entrants are either lessees or others lawfully on the premises with the consent of a lessee or a sublessee.⁶ See *Parker*, 565 S.W.2d at 514-15; § 360.

The trial court's findings of fact do not address whether the Ruvalcabas proved these prerequisites at trial. The Ruvalcabas, however, assert that these findings are supplied by presumption under TEX. R. CIV. P. 299. See *Vickery v. Commission for Lawyer Discipline*, 5 S.W.3d 241, 252-53 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). Before this

⁶ Even before *Parker*, the Texas Supreme Court had established a similar principle for a property owner as to the business invitees of tenants who are selling goods at a store open to the public. See *Renfro Drug Co. v. Lewis*, 235 S.W.2d 609, 618 (Tex. 1950). The rule under *Renfro* and its progeny includes all the elements of § 360 and adds the additional requirement that the entrants be invitees of the tenant and possibly that the lessor be obligated under the lease to keep that portion of the premises in good repair. Since the *Renfro* prerequisites are more demanding than those of § 360, we only discuss the § 360 prerequisites; however, a substantially similar analysis and result would apply as to the *Renfro* prerequisites.

court can presume findings of fact in support of the trial court's judgment, the presumed findings must be supported by the evidence. TEX. R. CIV. P. 299; *Warren Petroleum Corp. v. Martin*, 271 S.W.2d 410, 412 (Tex. 1954) ("The court cannot presume a finding unless the evidence supports such a finding"); *Vickery*, 5 S.W.3d at 252-53. Because there is no evidence to support presumed findings of the above prerequisites, we hold that these findings cannot be supplied by presumption under TEX. R. CIV. P. 299 and that the Ruvalcabas cannot use § 360 to support the trial court's judgment or to confer invitee status on Johnathan.⁷

The Ruvalcabas argue that they satisfied all of the § 360 prerequisites; however they do not cite evidence in the record that would support presumed findings as to these prerequisites. The Ruvalcabas claim that American Industries leased part of the Building to Jose's employer, that American Industries retained control over the staircase in question, that Jose's employer was entitled to use the staircase as appurtenant to its leasehold, and that Johnathan was lawfully in the Building with the consent of Jose's employer. The Ruvalcabas, however, cite only three pages of the reporter's record in support of these assertions. In these pages, Jose Ruvalcaba testifies as follows: (1) in March of 1996, when this accident occurred, Jose was working for a security company with offices at 6006 Bellaire; (2) on March 7, 1996, Maribel and Johnathan came to see Jose around lunchtime; (3) when Maribel and Johnathan arrived at the office, Jose and the owner of the company,

⁷ American Industries asserts, among other things, that there is no evidence to support the trial court's finding that Johnathan and Maribel were invitees. American Industries also asserts that there is no evidence that Johnathan and Maribel were in the Building with the consent of Jose's employer. American Industries does not expressly address whether this court should presume findings of fact under TEX. R. CIV. P. 299 or whether there is evidence to support presumed findings. American Industries has sufficiently assigned error by attacking the trial court's express findings. This court cannot presume findings unless the evidence supports the presumed findings. TEX. R. CIV. P. 299; *Warren Petroleum Corp.*, 271 S.W.2d at 412; *Vickery*, 5 S.W.3d at 252-53. The rule that unchallenged findings are binding on the appellate court cannot apply to presumed findings under TEX. R. CIV. P. 299 because these findings do not exist until after the court has determined that they are supported by the evidence, in which case it is too late to challenge the evidence supporting them. When appellants have challenged the express findings to which potential presumed findings relate, we do not believe that appellants are required to explicitly argue against all potential presumed findings under TEX. R. CIV. P. 299.

Maricio Garcia, were discussing a few accounts; (4) Maribel decided to wait for Jose in the car so she left while Jose was still in the office; (5) about two minutes later she returned, screaming and hysterical, with an unconscious Johnathan in her arms; (6) Garcia was standing next to Jose when Maribel returned; (7) a receptionist named Alma was also present when Maribel returned; (8) Johnathan had fallen through the stairwell; and (9) the situation was chaotic, and they rushed out. We have examined the three pages of the reporter's record cited by the Ruvalcabras as well as the rest of the record, and we find that there is no evidence that the prerequisites of § 360 have been satisfied. There is no evidence in the record of any of the following: (1) that any lease existed between American Industries and any other party relating to any part of the Building; (2) that any lease relating to any part of the Building was entered into by Jose's employer; (3) that American Industries retained control over any part of the Building that a lessee is entitled to use as appurtenant to its leasehold; and (4) that Johnathan was a lessee of the Building or that he was lawfully on the premises with the consent of a lessee of the Building.

The Ruvalcabras claim that Johnathan was invited onto the premises by Jose's employer, that the owner of Jose's employer, Maricio Garcia knew that Johnathan and his mother were there and that there is no evidence that Garcia objected to their presence. However, both Jose and Maribel Ruvalcaba testified that Maribel and Johnathan had never been up to the offices of Jose's employer before the occurrence made the basis of this suit. Garcia did not testify, and there was no evidence that Jose's employer consented to Johnathan's visit to the premises. There was no evidence that Jose or his employer were expecting either Maribel or Johnathan to visit the premises on the day of the occurrence made the basis of this suit. While Jose did testify that he was talking to Garcia when his wife and son arrived at the office, there is no evidence that Garcia was aware that Johnathan was there until after Johnathan had already fallen and sustained his alleged injuries. We hold that, even if § 360 applied to a Private Office Building, there is no evidence to support presumed findings of the factual prerequisites for the application of § 360. Therefore, no

findings as to the applicability of § 360 can be presumed, and § 360 cannot support the trial court's findings or supply a basis for affirming the trial court's judgment.

Is Johnathan an Invitee Because He is the Child of a Tenant?

The Ruvalcabas also assert that Johnathan is an invitee because he is the child of a tenant and because children of tenants are automatically considered to be invitees as to their parents' landlord. Both of these assertions are wrong. The Ruvalcabas do not cite any evidence in the record to support their assertion that Johnathan is the child of a tenant. There is evidence that Johnathan is the son of Maribel and Jose Ruvalcaba; however, there is no evidence that either Maribel or Jose is a tenant of American Industries. There is no evidence that Johnathan is the child of any tenant of American Industries. Further, the two cases cited by the Ruvalcabas do not support the proposition that children derive their premises liability status from their parents. *See Genell, Inc. v. Flynn*, 358 S.W.2d 543, 546 (Tex. 1962) (indicating that child is an invitee in her own right rather than derivatively from her parents); *Huvar v. Rex Corp. of San Antonio*, 387 S.W.2d 82, 83 (Tex. App.—San Antonio 1965, no writ) ("Mrs. Huvar and her fifteen-year-old daughter, Sharon, were tenants of the Rex Apartments . . . Sharon occupied the status of an invitee at the time of her fall"). There is no evidence that Johnathan is the child of a tenant, and even if he were the child of a tenant in the Building, this fact alone would not make Johnathan an invitee.

Is Johnathan an Invitee Because He was a Visitor to a Public Building?

The Texas Supreme Court has not adopted the "public invitee" concept of RESTATEMENT (SECOND) OF TORTS § 332 (1) & (2)(1965). *See Rosas v. Buddie's Food Store*, 518 S.W.2d 534, 536 (Tex.1975). The Texas Supreme Court has adopted a similar concept, however, by extending invitee status to members of the public who are invited into a store that sells goods and that is open to members of the public for the purpose of allowing them to inspect and/or buy the goods. *Carlisle v. J. Weingarten, Inc.*, 152 S.W.2d 1073, 1075-76 (Tex. 1941). The Ruvalcabas assert that Johnathan is an invitee under *Carlisle* and

its progeny because the Building was open to the general public. The trial court made no findings that Johnathan or his mother were "public invitees" or that the factual predicate for the applicability of *Carlisle* and its progeny had been satisfied. See *Prestwood v Taylor*, 728 S.W.2d 455, 457-58 (Tex. App.—Austin 1987, writ ref'd n.r.e.) (trial court's finding that plaintiff was a "business invitee" was not a finding that the plaintiff was a "public invitee.") The Ruvalcabas have not argued that any findings in this regard should be supplied by presumption under TEX. R. CIV. P. 299. In any event, before this court can presume findings of fact in support of the trial court's judgment, the presumed findings must be supported by the evidence. TEX. R. CIV. P. 299; *Warren Petroleum Corp.*, 271 S.W.2d at 412; *Vickery*, 5 S.W.3d at 252-53. Because there is no evidence to support presumed findings as to the *Carlisle* prerequisites, we hold that these findings cannot be supplied by presumption under TEX. R. CIV. P. 299 and that the Ruvalcabas cannot use *Carlisle* and its progeny to support the trial court's judgment or to confer invitee status on Johnathan.

In order to invoke the *Carlisle* rule, there must be evidence that American Industries invites members of the general public into the Building for the purpose of transacting business. *Carlisle*, 152 S.W.2d at 1075-76. The *Carlisle* court explained its reasoning as follows:

If one uses his premises for private purposes, he has no reason to expect visitors other than those especially invited by him; and hence is under no obligation to keep his premises in a safe condition for the protection of those who may enter thereon without his invitation. It may be more convenient for him and those who live and work thereon to allow the premises to remain in a condition that would be unsafe as to strangers. Under such circumstances, strangers having no business thereon of interest to the owner have no right to demand that such owner keep his premises in such condition that they may enter thereon in safety at their will. On the other hand, one who maintains a merchandise establishment, or other public place, to which, by reason of the business so conducted thereon, the public is impliedly invited to enter, necessarily expects visitors at all times. He knows that strangers may enter his place of business at any time, under the belief that, as members of the public, they have an implied invitation to so enter and inspect his merchandise, even

though they do not then have a present intention to make a purchase.
Carlisle, 152 S.W.2d at 1075.

There is no evidence in the record that American Industries invites the general public into the Building for the purpose of transacting business. There is no evidence of any store in the Building that sells goods and that is open to the public for the purpose of allowing them to inspect and/or buy goods. Photographs in the record depict the Building owned by American Industries as a plain, two-story office building with no signs or advertisements on the exterior. There are no indicia of any invitation from American Industries to the general public. Both Jose and Maribel Ruvalcaba testified that Maribel and Johnathan had never been up to the offices of Jose's employer before the occurrence made the basis of this suit. There is no evidence that members of the general public are allowed into the Building. Although there is a passing reference to the fact that Garcia's wife was in the office at the time of the occurrence made the basis of this suit, the record does not indicate whether she was there as an employee of Garcia's company or for some other purpose. In any event, the presence of Garcia's wife is no evidence that the Building is open to the general public. Where, as here, the premises owned by American Industries is not a retail establishment or other shop advertising that it is open to the general public for business, the element of invitation is absent, as is the presumption that the property owner is obligated to keep the premises in a safe condition suitable for the general public. *See, e.g., Prestwood*, 728 S.W.2d at 462 (explaining that the “distinctive hallmark of the requisite invitation is the possessor’s desire that the visitor come onto the premises” and that “from this the law infers the possessor’s representation that the premises are safe for the visitor’s entry”).

The cases relied on by the Ruvalcabas in their public building argument involve materially different facts from those in the record in this case. In *Carlisle*, the evidence showed that the building was used as a grocery store that was open to the general public, that it was customary for women to shop in the store accompanied by their young children, that the defendant did not object to this practice, that the plaintiff's mother and the plaintiff had

been shopping in this manner for three years before the occurrence made the basis of the suit without objection from the defendant, and that the defendant knew that plaintiff had accompanied her mother into the store at the time of her injury. *Id.* at 1074-75. In *Renfro*, the evidence showed that the drugstore defendant invited the general public to use a passageway through its store as a shortcut, hoping that people who were passing through would stop to purchase items in the drugstore. *Renfro*, 235 S.W.2d at 616-17. Indeed, the alleged defective condition—the door into the drugstore—had an advertisement for the drugstore's prescription department on it, and the evidence showed that thousands of people used the passageway through the drugstore each month. *Id.* at 617.

To come under the *Carlisle* rule, the Ruvalcabas had to prove that American Industries invites the general public into the Building for the purpose of transacting business. The Ruvalcabas did not prove this. The record indicates that the Building is a Private Office Building in which a security company has offices. The evidence is legally insufficient to bring this case under the *Carlisle* rule. Therefore, no findings as to the applicability of *Carlisle* and its progeny can be presumed, and the *Carlisle* rule cannot support the trial court's findings or supply a basis for affirming the trial court's judgment.

**Is Johnathan an Invitee Because All Young Children Are Invitees If the Owner
Can Reasonably Expect Young Children to Enter the Premises?**

The Ruvalcabas assert that Texas law has abolished the ordinary premises liability analysis as to young children and that all children are treated as invitees if the owner or occupier reasonably can expect that young children will come onto the land. The cases that the Ruvalcabas cite do not support this position. *See, e.g., Banker v. McLaughlin*, 208 S.W.2d 843 (Tex. 1948); *Courtright v. Southern Compress & Warehouse Co.*, 299 S.W.2d 169 (Tex. Civ. App.—Galveston 1957, no writ). The traditional analysis for premises-liability cases still applies to young children. *See, e.g., Texas Utilities Elec. Co. v. Timmons*, 947 S.W.2d 191, 193-94 (Tex. 1997) (affirming summary judgment against plaintiff and holding

that child was trespasser as a matter of law). It is true that, when all the elements of the attractive nuisance doctrine apply, the owner or occupier of the premises owes a child the same duty as an invitee. *Id.* at 193. However, the Ruvalcabas are not asserting an attractive nuisance claim. In any event, there were no pleadings, proof, or findings as to an attractive nuisance claim, and there is no evidence in the record that the staircase in question was an attractive nuisance.

Was There Any Evidence of Negligence by American Industries?

As shown above, there is no legally sufficient evidence in the record that Johnathan was an invitee. Therefore, Johnathan was not an invitee as a matter of law and was either a licensee or a trespasser. In either event, there is no evidence that American Industries was negligent.

If Johnathan was a licensee, then American Industries was only obliged to avoid injuring him willfully, wantonly, or through gross negligence and to warn of or make safe dangerous conditions that American Industries knew about. *See Lower Neches Valley Auth. v. Murphy*, 536 S.W.2d 561, 563 (Tex.1976). If Johnathan was a trespasser, then American Industries' only duty was not to cause injury willfully, wantonly, or through gross negligence. *Texas Utilities Elec. Co.*, 947 S.W.2d at 193. As previously noted, the trial court found that there was no evidence that American Industries acted willfully, wantonly, or with gross negligence. Therefore, if Johnathan was a licensee, then the Ruvalcabas had to prove that, on March 7, 1996, American Industries had actual knowledge that the staircase was a dangerous condition. *See Payne*, 838 S.W.2d at 237; *State v. Tennison*, 509 S.W.2d 560, 562 (Tex. 1974). If Johnathan was a trespasser, then there is no evidence of negligence as a matter of law because the trial court granted American Industries' motion for directed verdict and because there is no evidence of gross negligence or intentional conduct. *See Texas Utilities Elec. Co.*, 947 S.W.2d at 193.

Under the licensee analysis, the Ruvalcabas argue there is legally sufficient evidence

that American Industries had actual knowledge of the dangerous condition of the staircase on March 7, 1996—at the time of the occurrence made the basis of this suit. The Ruvalcabas assert that the record contains the following evidence that supports this argument: (1) Baker, American Industries' vice president of real estate, works in the Building and has an office there; (2) American Industries owns the Building and four other buildings; (3) Baker manages three buildings for American Industries and manages buildings for other entities; (4) Baker keeps a copy of the Houston Building Code and the Uniform Building Code in his office; (5) Baker has been using the staircases in the Building for the past ten years; (6) Baker testified that he believes that the staircase was safe at the time of the occurrence; (7) however, Baker later had balusters installed in the staircase to comply with the building code, and he acknowledged that "there is the matter of the law"; and (8) Baker acknowledges that a prudent property owner complies with applicable building codes and keeps abreast of the codes.

In determining whether there is any evidence that American Industries had actual knowledge on March 7, 1996 that the staircase in question was a dangerous condition, we consider only the evidence and reasonable inferences therefrom that support this proposition. *Texarkana Memorial Hosp., Inc. v. Murdock*, 946 S.W.2d 836, 838 (Tex. 1997). Unreasonable inferences do not constitute some evidence of American Industries' actual knowledge. *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 392 (Tex. 1997). Evidence of American Industries' actual knowledge cannot be established by piling inference upon inference. *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 858 (Tex. 1968); *accord Texas & N. O. R. Co. v. Burden*, 203 S.W.2d 522, 531 (Tex. 1947) (“an inference may not be drawn from another inference”).

Considering only the evidence favorable to the Ruvalcabas and the reasonable inferences therefrom, we find that there is no evidence that American Industries had actual knowledge that the staircase was a dangerous condition on March 7, 1996. The evidence cited by the Ruvalcabas may be some evidence that American Industries could have

discovered the staircase was a dangerous condition or that American Industries, acting in a reasonable manner, would have discovered that the staircase was a dangerous condition. This evidence, however, is no evidence that American Industries had actual knowledge that the staircase was a dangerous condition at the time of the occurrence. In *Jefferson Associates, Ltd*, the Texas Supreme Court held that evidence Prudential should have known or should have suspected that there was asbestos in the Jefferson Building was no evidence that Prudential had actual knowledge of asbestos in that building. See *Prudential Ins. Co. of America v. Jefferson Associates, Ltd.*, 896 S.W.2d 156, 162 (Tex. 1995).

Baker acknowledged that a prudent property owner complies with applicable building codes and keeps abreast of the codes. Robert Young—an expert witness for the Ruvalcabas—testified that the staircase was a flagrant code violation, that American Industries should have known that the stairs were not safe, and that an inspection by a safety examiner or engineer would have revealed that the staircase was a dangerous condition. However, there was no evidence that such an inspection was ever done. Baker testified that American Industries had not hired anyone to do any safety inspection of the Building before March 7, 1996. While there may be evidence in the record that American Industries could have discovered that the staircase was a dangerous condition or that it would have discovered this if it had acted reasonably, this is no evidence that American Industries had actual knowledge that the staircase was a dangerous condition on March 7, 1996. See *id*; accord *Kelly v. LIN Television of Texas, L.P.*, 27 S.W.3d 564, 572-73 (Tex. App.—Eastland 2000, pet. denied).

Further, evidence that American Industries knew of the existence of the staircase in question is not evidence that American Industries knew that the failure to have balusters was a dangerous condition. *Sipes v. Texas Dept. of Transp.*, 949 S.W.2d 516, 521 (Tex. App.—Texarkana 1997, writ denied); *Hastings v. De Leon*, 532 S.W.2d 147, 149 (Tex. App.—San Antonio 1975, writ ref'd n.r.e.). American Industries' installation of balusters after it became aware of the occurrence made the basis of this suit is no evidence that

American Industries had actual knowledge that the staircase was a dangerous condition at the time of this occurrence. There is evidence that Baker works in the Building, that he has used these stairs many times, and that he keeps a copy of the Houston Building Code and the Uniform Building Code in his office. There is no evidence that, before March 7, 1996, Baker noticed the lack of balusters in the staircase in question. While Baker stated that he had become familiar with the building codes applicable to the staircase after the occurrence made the basis of this suit, there is no evidence that, before March 7, 1996, Baker ever read or familiarized himself with the parts of the building codes in his office that pertain to the staircase in question. There is no evidence that Baker ever understood or realized that the staircase in question was a dangerous condition before March 7, 1996.

It might be reasonable to infer from the evidence that, before March 7, 1996, Baker noticed the lack of balusters in the staircase in question. However, we cannot reasonably infer from the evidence that, before March 7, 1996, Baker also knew and understood the building codes that apply to the staircase, that Baker realized that the staircase violated these codes, and that Baker knew that the staircase in question was a dangerous condition. The only way that we could conclude that there is any evidence of American Industries' actual knowledge would be by impermissibly piling inference upon inference. *See Schlumberger Well Surveying Corp*, 435 S.W.2d at 858; *Texas & N. O. R. Co.*, 203 S.W.2d at 531. Therefore, considering only the evidence favorable to the Ruvalcabas and the reasonable inferences therefrom, we hold that there is no evidence that American Industries had actual knowledge that the staircase was a dangerous condition on March 7, 1996. *See Schlumberger Well Surveying Corp*, 435 S.W.2d at 858; *Texas & N. O. R. Co.*, 203 S.W.2d at 531; *Kelly*, 27 S.W.3d at 572-73; *Sipes*, 949 S.W.2d at 521; *Pfeiffer v. Ebby Halliday Real Estate, Inc.*, 747 S.W.2d 887, 889-90 (Tex. App.—Dallas 1988, no writ); *Hastings*, 532 S.W.2d at 149.

While it is not evidence favorable to the trial court's finding, Baker testified that, before March 7, 1996, he was not aware that the staircase violated any applicable code and

that he considered the staircase to be safe. Baker further testified that, before March 7, 1996, he was not aware of any reports of injury or complaints regarding staircases in any of American Industries' buildings. There was also evidence that the Building had passed a City of Houston building inspection as recently as November, 1994, and that no mention had ever been made about the staircase not being up to code. Although the trial court, as finder of fact, could disbelieve all of this evidence, the trial court's disbelief of this evidence is no evidence that the opposite is true or that American Industries had actual knowledge on March 7, 1996 that the staircase in question was a dangerous condition. *Texas & N. O. R. Co. v. Grace*, 188 S.W.2d 378, 380 (Tex. 1945) (testimony from an interested witness, though disregarded by the jury, is not evidence that the opposite is true); *accord Castillo v. Neely's TBA Dealer Supply, Inc.*, 776 S.W.2d 290, 295 (Tex. App.—Houston [1st Dist.] 1989, writ denied).

Because there is no evidence in the record that American Industries knew the staircase was a dangerous condition and because there is no evidence that Johnathan was an invitee, there is no evidence that American Industries breached its negligence duty, regardless of whether Johnathan was a licensee or a trespasser. *See Texas Utilities Elec. Co.*, 947 S.W.2d at 193; *Payne*, 838 S.W.2d at 237; *Tennison*, 509 S.W.2d at 562. Accordingly, American Industries' first two issues are sustained, and we reverse and render judgment that the Jose Ruvalcaba and Maribel Ruvalcaba take nothing against American Industries as next friends of Johnathan Ruvalcaba.

Can Jose and Maribel Recover on Their Claims When Johnathan Takes Nothing?

The trial court awarded Jose and Maribel judgment on their loss of filial consortium claims, and it also awarded Maribel judgment on her bystander claim. We do not reach the issue that has been raised by American Industries as to whether Texas recognizes claims for loss of filial consortium. If loss of filial consortium claims were recognized in Texas, they would be derivative of the child's personal injury claim and would be barred if the child has

no recovery. *Krishnan v. Sepulveda*, 916 S.W.2d 478, 482 (Tex. 1995). Although bystander claims are considered independent and not derivative, it is also true that the bystander plaintiff cannot recover unless the injured person can recover. *Estate of Barrera v. Rosamond Village Ltd. Partnership*, 983 S.W.2d 795, 799-800 (Tex. App.—Houston [14th Dist.] 1998, no pet.). We sustain American Industries argument under issues 11-15 that, because Johnathan has no recovery against American Industries as a matter of law, any filial consortium and bystander claims of Jose and Maribel also fail as a matter of law. *Krishnan*, 916 S.W.2d at 482; *Estate of Barrera*, 983 S.W.2d at 799-800.

Conclusion

There is no evidence to support the trial court's findings of negligent activity, business invitee status, and breach of negligence duty by American Industries. We do not believe that RESTATEMENT (SECOND) OF TORTS § 360 (1965) applies to a Private Office Building. Even if it does, we conclude that there is no evidence of the following: (1) that Johnathan was injured by a negligent activity or instrumentality; (2) that Johnathan and Maribel were invitees; (3) that the factual prerequisites for the application of § 360 have been satisfied in this case; (4) that Johnathan was the child of a tenant; (5) that Johnathan was a visitor to a public building; and (6) that American Industries breached its duty to Johnathan as either a licensee or a trespasser. We reject the Ruvalcabas' assertion that all young children are invitees in cases where the owner can reasonably expect young children to come onto the land. Any filial consortium⁸ and bystander claims of Jose and Maribel fail as a matter of law because Johnathan takes nothing. We do not reach the other issues and arguments raised by American Industries because the issues already sustained support a reversal and rendition of judgment in favor of American Industries. Therefore, we reverse the judgment of the trial court and render judgment that the Ruvalcabas take nothing against American Industries.

⁸ We do not decide whether a claim for loss of filial consortium exists under Texas law.

/s/ John S. Anderson
Justice

Judgment rendered and Substitute Opinion filed September 20, 2001.

Panel consists of Justices Anderson, Fowler, and Edelman. (J. Fowler concurring).

Publish — TEX. R. APP. P. 47.3(b).

**Motion for Rehearing Overruled; Reversed and Rendered; Opinion of March 15, 2001
Withdrawn and Substitute Majority Opinion and Concurring Opinion on Motion for
Rehearing filed September 20, 2001.**



**In The
Fourteenth Court of Appeals**

NO. 14-99-00077-CV

AMERICAN INDUSTRIES LIFE INSURANCE CO., Appellant

V.

**JOSE RUVALCABA AND MARIBEL RUVALCABA, INDIVIDUALLY AND AS
NEXT FRIEND TO JONATHAN RUVALCABA, A MINOR, Appellees**

**On Appeal from the 151st District Court
Harris County, Texas
Trial Court Cause No. 97-08897**

**CONCURRING OPINION
ON MOTION FOR REHEARING**

This is a frustrating case. It is frustrating because it seems that the law should have had a different response to the case than it did. Our majority opinion detailed the tragic accident befalling young Jonathan Ruvalcaba and his family. In the trial following this accident, the trial court entered an \$8,384,657.52 judgment in favor of the Ruvalcabas.

However, because we are bound by a rigid premises liability system that does not provide a readily ascertainable classification for a plaintiff like Jonathan, and because the evidence presented in support of recovery under a premises liability theory was insufficient, we must reverse that judgment, and render one that the Ruvalcabas take nothing on their claim against American Industries Life Insurance Company.

I write separately to address what I think is the inadequacy of our system of establishing landowner liability, and to comment on the Ruvalcabas' claim that the result in this case is unfair.

First, it is clear that the law applicable to the Ruvalcabas' appeal is that of a strict, unyielding, and rigid premises liability classification system. Under this system, the status of the entrant controls – that classification often matters more than what the land owner or occupier has done or failed to do, and more than the legitimacy of the visit. This system produces results that, at times, can be contrary to common sense.

When a plaintiff is a licensee, as Jonathan arguably is in this case,⁹ the owner is negligent with respect to the condition of the premises if (1) the defendant has actual knowledge of the condition, (2) the condition is unreasonably dangerous, (3) the plaintiff did not have actual knowledge of the danger, and (4) the defendant failed to exercise ordinary care to protect the plaintiff from danger by failing to adequately warn the plaintiff of the condition, and by failing to make the condition reasonably safe. *State v. Williams*, 940 S.W.2d 583, 584 (Tex. 1996) (per curiam). This heavy burden – of proving actual knowledge as opposed to a lesser burden such as constructive knowledge – does not seem

⁹ Although the trial court found Jonathan was a business invitee, Jonathan clearly was not visiting his father for a pecuniary purpose, which is required for one to be cloaked with business invitee status. Instead, Jonathan was visiting his father for a social reason – to share some time with him over lunch; regrettably, this reason warrants less protection.

In their motion for rehearing, the Ruvalcabas contend that Jonathan is treated by our opinion as a trespasser, and that, as a result, all people visiting office workers are treated as trespassers unless they can demonstrate that they had a present business relationship with the building owner. Jonathan is not classified as a trespasser in this opinion. The practical result may be that, as a licensee or trespasser, Jonathan cannot recover. But that in no way relegates social visitors to trespasser status. The proof in this case, as explained herein, cannot support recovery for a licensee – that does not mean that a licensee could never recover in this type of situation, just that Jonathan could not in this particular situation.

to be one that more modern notions of responsibility would place on one who was in a building for a legitimate reason. After all, if Jonathan had been a businessman visiting the premises, American Industries would have been liable if it had possessed constructive knowledge, or should have known, of the dangerous condition. However, because Jonathan was only a child visiting his father who worked in the building, American Industries was liable only if it had actual knowledge of the dangerous condition.

A premises owner or occupier should not be strictly liable for conditions that result in injury, and should not be considered an insurer against all risk of injuries that others might sustain on its property. However, this case is a good example of the inadequacies in our current system of determining landowner liability. For example, here, the Ruvalcabas argued, and the trial judge agreed, that Jonathan was a business invitee. (The majority has already detailed why Jonathan was not an invitee – to start with, he wasn't there for a pecuniary visit that was mutually beneficial to him and the landowner.) Yet, I conclude that Jonathan is a licensee, not an invitee, because he was a social guest. And, although I say he is a licensee, I admit he isn't the typical licensee. Someone else might even argue that Jonathan was a trespasser. This confusion is not unusual. For when litigants test our premises liability system with new issues, the system is not flexible enough to encompass them; unless a person fits precisely under one of its categories, it can be difficult to determine the appropriate classification for them.¹⁰

This uncertainty as to which classification applies creates problems for litigants and judges. Litigants have difficulty in determining what facts they need to prove to meet their burden. They have to make their best guess and hope they're right. Judges have trouble determining what classification applies. Consequently, one of several results will often occur: (1) judges can't agree how the categories should be applied, *e.g.*, *Mellon Mortgage*, 5 S.W.3d 654 (Tex. 1999), or (2) judges engage in mental acrobatics to fit the litigant into

¹⁰ An excellent example of this problem is *Mellon Mortgage Co. v. Holder*, 5 S.W.3d 654 (Tex. 1999), which produced three opinions and interpretations of law for the plurality opinion and one dissent. Three of the opinions could not agree how the plaintiff should be classified, and one ignored the classifications altogether, presumably thinking it more logical to approach the case in a different way.

a category, or (3) judges apply the categories rigidly, as here, so that the plaintiff recovers nothing when, arguably, the system ought to impose a different duty on the land owner or occupier.

The reason this confusion or uncertainty results is that the system is not logic-based. Maybe centuries ago it was logical, because people were not as mobile as they are today, but, in our modern world, it is not logical. One who is looking at an event (other than a slip and fall) cannot determine, by relying on logic and general legal principles, whether liability will be imposed. Instead, one must put on blinders and apply this rigid system. This creates uncertainty in this area of the law; and, one of the responsibilities of the judiciary is to provide order, not uncertainty. This is reason enough to question the continued usefulness of applying the centuries-old common law premises liability classification system.

This brings me to the next point of discussion, one that formed part of the basis of the Ruvalcabas' complaint on rehearing – our holding that there was insufficient evidence to support a showing of actual knowledge. Although the Ruvalcabas complain mightily that they met their burden,¹¹ the evidence did not support a finding of actual knowledge. The building manager testified he was unaware of the danger posed by the stairs. In fact, he affirmatively stated that he did not think the stairs were dangerous. In support of this, he cited to the fact that no prior complaints about the stairs had been made, and no prior injuries had occurred on the stairs. No other evidence was produced to show that a reasonable person in the building manager's position would have realized that this accident, or some similar accident, was likely to occur. Although he agreed that a reasonable property manager would keep up with the city codes, the building manager testified that he was not familiar with them. Moreover, the record contains no evidence on (1) whether any families had ever visited the building before, (2) whether visitors ever came to the building, (3) whether the building manager ever had any children visit him or whether other children had used the stairs while with him there, or (4) whether the building manager had young children

¹¹ Of course, the burden the Ruvalcabas argued they needed to meet was a “should have known” standard, not an actual knowledge standard.

of his own.¹² There simply is nothing in the record from which we could infer actual knowledge.

For these reasons, I join fully in the majority opinion but also write separately.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Substitute Opinion filed September 20, 2001.

Panel consists of Justices Anderson, Fowler, and Edelman. (J. Fowler concurring)

Publish — TEX. R. APP. P. 47.3(b).

¹² These examples pertain to the likelihood that the building manager might have reason to scrutinize the stairs with the safety of children in mind. The Ruvalcabas may already have known the answers to these questions but did not introduce them because the answers would not have been helpful to their case.